

The Commission ultimately affirmed that its "charges are based primarily on the Commission's cost of providing ... regulatory services." Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("Fees I"), 2 FCC Rcd 947, 948 (1987), Supplemental Order, 2 FCC Rcd 1882 (1987), recon. granted in part, 3 FCC Rcd 5987 (1988). In response to comments "that certain fees are too high or have no link to processing costs," the Commission stated only that "these fees are now statutory and may be changed only through a future action by the Congress. We recognize that some of the underlying processing costs and procedures on which we based our fee recommendations to Congress have changed or will change in the future.... Thus, the Commission's processing costs were but one factor in the rough calculus that resulted in the legislated fees." 2 FCC Rcd at 948-949.

Addressing Petitions for Reconsideration of the Fees I decision, the Commission acknowledged complaints "that a given fee in no way reflects the amount of actual effort expended by the Commission on a particular application or type of application," but again explained "that the amount of the fee represents the Commission's estimate, accepted by Congress, on

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<sup>2/</sup>(...continued)

later updated to factor in new services, changes in application processing technology, personnel cost, etc." 51 FR at 25793 ¶ 24 and n.30 (citing the Notice of Inquiry, Fee Refunds and Future FCC Fees, 69 FCC 2d 741, 747-755 (1978), regarding cost calculation).

the average cost to the Commission of providing the service." 3  
FCC Rcd 5987, 5987 (1988).

As noted, the 1989 Budget Act increased all existing fees and imposed new fees on additional regulatory services. The result was a doubling of revenues from the fee program and a nearly threefold increase in the number of applications requiring fees. Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989 ("Fees II"), 5 FCC Rcd 3558 (1990), recon. granted in part, 6 FCC Rcd 5919 (1991). The Commission again noted that it had "worked with Congress to ensure that, to the best extent possible, fees reflect only the direct cost of processing the typical application or filing." 5 FCC Rcd at 3574.<sup>3/</sup> The new fee schedule established multiples of a fee based on the number of frequencies, stations, call signs, waivers, etc. requested by an applicant. Id.

As explained below, recent Commission proceedings cite the statutory Schedule of Charges as authorizing the application fees established in those proceedings. Attempts before the Commission to change those fees have been unsuccessful, and no court litigation has arisen challenging the Commission's fees established under authority of the 1985 and 1987 Budget Acts.

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<sup>3/</sup> The Commission pointed out, however, that "Congress did adopt a minimum fee of \$35 that may not reflect the actual cost of processing." 5 FCC Rcd at 3574.

### **III. Fees Established in Recent Commission Proceedings**

A. Booster Stations: In 1987, the Commission did not impose a fee for TV booster applications, because it did "not have the authority to institute fees for services that were not included in the Schedule of Charges added as new section 8 to [the Communications Act]." FM Booster Stations and Television Booster Stations, 2 FCC Rcd 4625, 4634 (1987).

B. Part 22: The Commission's initial fees for cellular systems and domestic public land mobile radio services ("DPLMRS") were established in the fee program proceeding instituted after the 1985 Budget Act passed. See 2 FCC Rcd at 971-72. With respect to the fee of \$200 per transmitter in the DPLMRS, the Commission stated that "[c]onsistent with the Communications Act's mandate to require these fees on the basis of the number of transmitters requested, we will require that applicants submit \$200 for each such transmitter listed on Form 401." Id. at 972. The Commission cited the "Conference Report at [page] 429." Id. at 972, 986 n.185.

With respect to cellular, the Commission initially adopted a fee of \$200 per cellular system. 2 FCC Rcd at 972. In the Third Report and Order in the cellular rulemaking proceeding, the Commission declined to adopt higher application fees, which had been proposed as a method of deterring speculative applications, finding that "imposition of the \$200 filing fee has [not] caused a significant reduction in the number of applications filed." 4 FCC Rcd 2440, 2442 (1988). The

Commission did concede that "[a] larger filing fee would probably reduce the number of RSA applications filed," id. at 2447 n.16, but stated that "the fee is set by Congress" and could only be increased pursuant to 47 U.S.C. § 158(b)(1). Id.

C. Part 21: The Commission did not change filing fees for applications for Part 21 authorizations when it adopted a one-step licensing procedure to replace the old procedure whereby applicants first filed an application for a construction permit authorization and later filed an application for a license to operate. The new procedure required filing an application for a license conditioned on the subsequent filing of a certification of completion of construction. "The new ... procedure ... does not modify the substantive efforts of the staff in reviewing the applications.... While this consolidation clearly lessens the burden on the public..., the same work is required of Commission staff to review and issue these authorizations. This effort is simply consolidated at the time the staff reviews the application for an initial license conditioned upon construction."

Clarification of Part 21 Filing Fee Requirements and Application Form Use, 64 RR 2d 471, 472 (1988).

D. 220-222 MHz: In its Report and Order in the 220-222 MHz proceeding, the Commission found that "each ... nationwide filing[] will be, in terms of substance and processing, the equivalent of many separate applications." Rather than require 350 or 700 applications (one for each 5 or 10 channel nationwide application), however, the Commission required

only one application, but stated: "This one ... [application] ... still constitutes the filing of a minimum of 350 or 700 applications that will be assigned separate file numbers and, if granted, given separate call signs. Thus, the fee for filing for nationwide systems must be calculated by multiplying \$35 by the number of call signs needed (one call sign per channel per market) for each license." 6 FCC Rcd 2356, 2364 (1991). The Commission stated "[t]hese initial fees are consistent with our fee schedule." Id. In a Memorandum Opinion and Order addressing Petitions for Reconsideration of the Report and Order, the question of fees and fee amount did not arise. 7 FCC Rcd 4484 (1992).

E. IVDS: Here, the Commission stated that "because the service is being regulated as a personal service under Part 95..., applicants must pay a fee of \$35.00 per call sign (i.e., per [Cell Transmitter Station]." Interactive Video and Data Services, 7 FCC Rcd 1630, 1639 (1992). However, this is problematic because an IVDS applicant is required to file only one Form 155 (a fee form), regardless of the number of CTSS it proposes to construct. The Commission's solution was to "initially blanket license all applicants for a predetermined number of CTSS.... In particular, we believe a minimum of 40 CTSS per market would provide the flexibility needed for most IVDS systems. Thus, the filing fee ... will be calculated by multiplying \$35.00 by 40 CTSS [\$1400]." Id. at 1640. Forty CTSS represented a "reasonable compromise." Id. at n. 112.

The \$1400 fee was challenged in a Petition for Reconsideration asserting that the Commission lacked statutory authority because no actual application was being filed. In response, the Commission stated that the Form 155 is being used as the initial application, regardless of the number of proposed CTSSs. "The fee for this application is consistent with the statute and our fee schedule. Further, we used a similar approach to determine the filing fee in other private radio services where the applicant files a Form 155," citing the 220-222 MHz proceeding. 7 FCC Rcd 4923, 49251, FCC 92-331, ¶ 15 (rel. August 4, 1992). The Commission also stated that it arrived at the \$1400 figure after considering, among other things, the problems associated with having different filing fees for different markets. Id.

F. PCS: In the PCS NPRM, the Commission proposes that if lottery selection procedures are used, "application fees be calculated using a procedure similar to that used" in licensing the 220-222 MHz band. FCC 92-333 ¶ 89. "Applying the same methodology to 2 GHz PCS would result in an application fee of approximately \$3 million, for example, for a nationwide license to operate on one of the 30 megahertz blocks if such licenses are authorized. This figure is based on an assumption of 1200 channel pairs (12.5 kHz bandwidth) times 70 markets (as assumed for 220 MHz nationwide licenses) times \$35 per call sign, yielding a total application fee of \$2.94 million." Id. The Commission noted, "[t]hese calculations assume that PCS is

defined as a private radio service. If it is classified as a common carrier, a fee of \$230 per transmitter would apply." Id. at n.60.

#### **IV. CONCLUSIONS**

Based upon the foregoing, the following general conclusions can be reached regarding the Commission's fee authority, which must be kept in mind in licensing PCS services:

- ° The fees structure is set by statute. In establishing a fee with respect to a particular application proposal, the Commission must determine that the service properly falls within an existing fee category, or take steps to amend the statute in order to create a new category with respect to the new service.
- ° Generally, statutory fees are set to represent a rough approximation of average processing costs associated with a particular application.
- ° Historically, the Commission has charged fees for common carrier services on a per-transmitter basis, and has charged fees in the private radio services on a per-call sign basis. The Commission has some discretion to set application standards

which dictate the number of transmitter sites  
and/or the number of individual call signs which  
must be included in license applications.



**CERTIFICATE OF SERVICE**

I, Tana Christine Maples, a secretary in the law firm of Bryan Cave, do hereby certify that on this 9th day of November, 1992 copies of the foregoing **Comments of PacTel Paging on the Notice of Proposed Rulemaking** were hand delivered, courier charges prepaid, to the following:

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